No. 12,784

IN THE

United States Court of Appeals

For the Ninth Circuit

HUNG CHIN CHING,

Appellant,

vs.

FOOK HING TONG, CHONG HING TENN and KUI HING TENN,

Appellees.

Upon Appeal from the Supreme Court of Hawaii.

BRIEF FOR APPELLEES.

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JURISDICTIONAL STATEMENT.

The jurisdiction of the Hawaiian courts is based upon Section 81 of the Organic Act of Hawaii (48 U.S.C. Section 631). The jurisdiction of the Circuit Judge at Chambers was founded upon Sections 12401 and 12402, R.L.H. 1945, conferring upon the circuit judge jurisdiction to hear and determine equitable causes. The jurisdiction of the Supreme Court of Hawaii rested upon Sections 9604 and 9503 as amended, R.L.H. 1945, and that of this Court rests upon 28 U.S.C. Section 1293, the jurisdictional amount being

established by affidavit (R. 85). The final order of the Supreme Court of Hawaii was entered September 12, 1950 (R. 68). A petition for rehearing was denied on November 16, 1950 (R. 77).

STATEMENT OF THE CASE.

The bill in the present action is entitled "A Bill to Declare Trust and Lien, for an Accounting, for Receiver, and for Money Judgment."

Appellees are brothers (R. 108). On an evening in the latter part of September 1941, they met at their father's house in Honolulu. Also present were their father and appellant, Hung Chin Ching (R. 108). Appellees had heard that the Green Mill was for sale (R. 154). As a result of this information the whole group went out to talk to Lum Kam Hoo, the proprietor. He told them the price was $25,000, plus inventory, and referred them to his attorney, Hiram Fong, who was to handle the necessary papers (R. 111). The group then returned to the father's home where they discussed finances. Appellant wanted to come in on the deal for a $3,000 interest (R. 112). Dr. Tong, one of the appellees, testified:

> All I can remember now,—it is so long ago—is that Mr. Ching had no finances. He was trying to induce me to finance him on the thing. I told him if he wanted to get in, he must take the risk, at least show good faith by putting his money in. (R. 112).

A few days later Dr. Tong left his $10,000 in the hands of Kui Hing, another of the appellees, and returned to Maui where he was stationed (R. 123).

As Elsie Lum, the wife of the vendor and the owner of an interest in the business, testified, before the sale could be completed, a meeting with the Liquor Commission was necessary and, pending that meeting (which it was realized would take a couple of weeks to arrange) Chong Hing Tenn, the third appellee, and Hung Chin Ching came over and operated the business (R. 258).

Apparently Chong Hing Tenn and Ching did not get along too well (Petitioner's Exhibits A, R. 130, and A-1, R. 133). Chong Tenn testified that the disagreement was occasioned by Ching's drinking on the premises (R. 242).

In the interval before the sale could be completed, appellees Chong Hing Tenn and Kui Hing Tenn were out trying to raise the money which they had agreed to contribute toward the purchase price. The evidence shows that they were successful in their efforts by the 30th of September (Respondents' Exhibit 2, R. 374).

On the 30th of September they paid Lum Kam Hoo $15,000 (Res. Ex. 3, R. 376), and on the 2nd of October the remaining $10,000 (Res. Ex. 4, R. 377).

On October 6, 1941, Hiram Fong sent a letter to the Liquor Commission on behalf of Elsie Lum requesting that the liquor license be transferred to

Chong Hing Tenn. Attached was a bill of sale from Elsie Lum to the appellees dated October 10 (R. 202). On October 9, 1941, a report was filed by the Assistant Chief Inspector to the Commission approving the transfer (R. 203), and the license was granted October 10 (Pet. Ex. B, R. 159).

The partnership agreement among the appellees is dated October 14 and recites that the partnership was entered October 1 (Res. Ex. 1, R. 146). Dr. Tong signed this agreement October 16 (R. 145).

The actual bill of sale which completed the transfer is dated October 20 (Pet. Ex. C, R. 161). Notice of the sale appeared in the Advertiser on October 23 and 24 (Pet. Ex. H, R. 232) and the assignment of the lease was made October 30 (Pet. Ex. G, R. 227).

Although appellant testified at one point that he considered himself a proprietor of the business from the time it was taken over (R. 313), he did not resign from the police force despite the fact that the rules of the department provide that no one may be a police officer who is interested in a liquor establishment (R. 195, 313), and at another point in his testimony he stated: "If I had purchased an establishment I would have resigned" (R. 281). Nor did he, during the period of over a month while the transfer was taking place, ever make any move toward contributing the $3,000 upon which his participation in the enterprise was conditioned (R. 112, 251; Pet. Ex. A, R. 130), despite the fact that both Chong Hing Tenn and Dr. Tong asked him for payment (Pet. Ex. A,

R. 130, 145, 168, 244, 345) and that Dr. Tong made it clear that he would have to put up his money if he was to take part (Pet. Ex. A, R. 130, 145, 345).

Appellant testified that he could have raised the money (R. 304), although he never did have the money in hand (R. 194) and although he was actually in a very bad financial situation at this time. In September a check he had given the Green Mill bounced (R. 317) and a little later when he flew to Maui to see Dr. Tong he had to get an unsecured loan of $75.00 to make the trip (R. 194). He testified that the reason he never came forward with the money was that Chong Hing Tenn never asked for it (R. 303). He also produced a witness who testified that he would have loaned him $2,000 without security (R. 192). Appellant further testified that he planned to raise the other $1,000 by giving a second mortgage on his house to his brother (R. 304). The record does not, however, disclose that appellant ever made any inquiry as to when the money would be needed, despite Dr. Tong's warning (Pet. Ex. A, R. 130) and despite the fact he knew the steps necessary to complete the sale were going forward (R. 270, 328, 332, 339, 340).

In order to get the approval of the Liquor Commission, an application for the transfer of a license must have a bill of sale attached (R. 337). The Liquor Commission has a policy against hidden partners in such an establishment (R. 213). It was necessary to inform the Commission who the new

proprietors would be. Accordingly Chong Hing Tenn early in October informed Hiram Fong, who was drawing the papers, that the partners would be the three appellees (R. 168). Since appellant had failed to produce his share on demand (R. 168, 331) and since he was in bad financial straits (R. 194, 317), it appeared unlikely that he would put up the $3,000, so he was not named as a partner, but Dr. Tong testified that he was still holding three shares for him if he got the money (R. 364); that he was willing to let him in, even as late as the time of the telephone call from Hiram Fong's office; and that he stated this to appellant at that time (R. 145).

On the 11th of October, appellant went to Hiram Fong's office and there learned that the partnership papers were being drawn up and that he was not named in them. From Fong's office he telephoned Dr. Tong on Maui (R. 150, 328). Dr. Tong testified that he told Ching he was in if he had the money (R. 150). Appellant then borrowed $75.00 (R. 194) and the next day went to Maui to see Dr. Tong (R. 150, 371). He still did not offer to put up his share, so Dr. Tong informed him that since he hadn't put up the money he was out (R. 145, 372). Shortly after this, appellant ceased working at the Green Mill (R. 237).

Appellees had signed a note and mortgage of the premises to pay off the inventory of $10,046.27 (R. 223). They were paying it at the rate of $1,000 a month (R. 131) when the events following the Japa-

nese attack on Pearl Harbor closed the business, whereupon Dr. Tong assumed $5,000 of the amount remaining to be paid (R. 138).

Appellant never did offer to pay his share. He took no further action of any kind until after the business had weathered the period following Pearl Harbor (during which it was completely closed) and was doing a rushing business. Then in January 1944 he made demand on appellees for a share (R. 319) and in April of that year commenced this action.

SUMMARY OF PLEADINGS AND PROCEEDINGS BELOW.

The bill which appellant filed on April 5, 1944, alleged the original meeting with Lum, an agreement among the parties, and the taking over of the business during the so-called trial period. As a basis for his claim to relief, the appellant alleged, in substance, that he was at all times ready, willing and able to put up his share of the purchase price but that appellees, in violation of the original agreement and in fraud of his rights, purchased the business for themselves. Appellant prayed, among other things, for a declaration of trust of the business, for the declaration of a lien on the business, for an accounting, and for a money judgment. A series of demurrers followed, which were sustained.

Finally in November 1947 a fourth amended bill was filed which contained the added allegation that in January 1943 Dr. Tong had promised, in respect

to this claim, to compensate appellant and that, relying on this assurance, he had delayed his action until the passage of time convinced him that appellees would not keep their promise.

On the basis of this allegation of negotiation as late as January 1943, the last demurrer was overruled and the case went forward.[1]

Appellees answered the bill on June 16, 1948. In their answer they denied the allegations of paragraphs III to XIV, inclusive, of the petition wherein the appellant had set out his version of the happenings and the relations among the parties. They also denied that any agreement for a partnership among the parties had ever been consummated; that appel-

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[1]The following testimony is the whole of the evidence offered at the trial in support of this detailed and crucial allegation added in order to overcome the demurrer (R. 311):

Q. Now you say that you thought Doctor Tong would do the right thing by you in the Green Mill?
A. That's right.
Q. So Doctor Tong,—did Doctor Tong indicate in any way that he would, during that time?
A. Nothing concrete.
Q. Pardon?
A. Nothing concrete was done by him.
Q. Did he give you the impression that he would?
A. Yes.
MR. LEE: Your witness.

Cross Examination

BY MR. WADDOUPS:
Q. After your conference on Maui, how many times did you see Dr. Tong again, between that conference time and the time you filed this suit?
A. How many times? Many times.
Q. Where?
A. At his home.
Q. Here?
A. In Honolulu.
Q. You called on him personally?
A. Yes.

lant had ever made a tender of the $3,000; and that they had ever negotiated with him toward a settlement of his alleged claim. They stated that they had at all times acted in good faith toward appellant.

They then went on to deny paragraphs XV to XXI of the bill, and to allege laches by way of further defense.

On the issues joined the case was tried, and at the conclusion of the hearing the trial judge rendered an oral decision finding for appellant. Some three weeks later the trial judge set aside his oral ruling and took the case under advisement (R. 43). A month later he issued a written decision finding for the appellees (R. 43). In this decision, after setting out the sequence of events, the trial judge said:

> Petitioner's story of lack of demand, coupled with the promise of an unsecured loan from a competitor to pay his share, seems rather weak as against a direct demand and warning by Dr. Tong to get the money, and never discussing the matter of putting up his $3,000.00 when he knew at the time that the necessary transfers were being made by attorney Fong. (Decision p. 5)

At the conclusion of his opinion, the trial judge said:

> It was not until late 1943, when every bar in town had a doorman or bouncer to keep the prospective customers from overcrowding the bars, and all bars had for over a year been doing a land office business, that petitioner sought to get his original agreed share in the business.
>
> On October 1, 1941, petitioner unquestionably had a right upon putting up $3,000 to get a share

in the business. Means were then available to him to learn and be aware of what was going on relative to the proposed partnership. He could have checked on the transfer of the liquor license, the assignment of the lease through either Fong or Lum, and the Gross Income License at the Tax Office, and acted accordingly. But he did nothing. Equity helps the vigilant, not those who sleep on their rights.

The agreement on which this action is based was one to form a partnership. It was never formed, principally because the petitioner could not, would not, or did not put up his share of the investment in the proposed venture, and the court can see no equity in his present request to share in the profits of the industry and financed enterprise of the respondents.

A decree in favor of the respondents and against the petitioner, together with costs, will be signed on presentation.

A decree in accordance with the decision was entered on September 2, 1948.

The Supreme Court of Hawaii in its decision reviewed the pleadings, the findings of the trial judge and restated its rule as to the scope of review of findings of fact on equity appeals, stating that the sole question was whether the evidence was such as to warrant the finding made below (R. 63). It stated:

From a review of the record and the facts established below, we find that the petitioner has failed to prove either bad faith, a violation of or exclusion from the oral agreement that he become a party purchaser, a violation of confi-

dence reposed by him in the respondents, or fraud perpetrated upon him by any or all of the respondents.

The Supreme Court held that:

> The record further discloses that petitioner's right of contribution was expressly conditioned upon tender of his contributive share as agreed upon. This he failed to do. (R. 66)

The court found (R. 64-67) that the parties entered into an agreement to purchase the Green Mill Cafe, the purchase price being payable October 1, 1941, and that appellant knew of this date as was admitted by his sworn petition; that the purchase was not, however, consummated until October 20, 1941; that the appellant therefore had by the operation of time and the consent of the appellees until that date to perform; that he had notice of this extension but that he did not come forward with his share and had given no satisfactory reason for this failure. Accordingly without reaching the question of laches it affirmed the decision below.

Appellant subsequently filed a petition for rehearing urging principally that with the making of the oral agreement to purchase the premises the appellant along with appellees then and there became an equitable owner of those premises. Presumably the point of this assertion was that this relieved him of the necessity of contributing his share. Appellant also urged that there was a joint venture formed, that the oral decision made by the trial judge was still extant

and required a finding for him. The Supreme Court in denying the petition reiterated in substance that the failure of appellant to contribute his share of the capital prevented his recovery against the appellees under the agreement between them. In regard to the oral decision of the trial court, the Supreme Court stated that it was at variance with the written decision (R. 79) and further, that since the appeal was from the decree under the Hawaiian statutes and cases and not from the decision the point was without merit.

From the two decisions of the Supreme Court of Hawaii the appellant has come here with twenty assignments of error.

QUESTIONS PRESENTED.

(1) Did the Supreme Court of Hawaii commit manifest error in holding that appellant could not recover because of his unexcused failure to meet the condition precedent to his becoming a partner in the ownership of the Green Mill, i.e., to contribute the agreed sum of $3,000?

(2) Was appellant guilty of laches in delaying two and one-half years in filing this action?

SUMMARY OF ARGUMENT.

Appellant in his brief has ignored completely the established principle of law as to the scope of review which this court will afford on questions of law and fact appealed from the Supreme Court of Hawaii. Conclusions and findings of the Supreme Court of Hawaii will be reversed only where there is manifest error. Such is not the present case, for there are ample authorities and evidence to support the conclusions and findings of the court below. These conclusions and findings turn largely on the credibility and weight of the evidence adduced at trial and are not only the concurrent findings of both courts but are obviously correct on a reading of the record.

Moreover the decree below is sustainable upon the alternative trial court ground of laches which the Supreme Court of Hawaii did not reach.

ARGUMENT.

I.

THE SUPREME COURT OF HAWAII WAS CORRECT IN HOLDING THAT APPELLANT, BY REASON OF HIS FAILURE TO CONTRIBUTE HIS AGREED SHARE OF THE PURCHASE PRICE, IS NOT ENTITLED TO RELIEF.

A. The decision below is reversible only if manifest error was committed in making findings of fact or conclusions of law.

In *Waialua Agricultural Co. v. Christian,* 305 U.S. 91 (1938), the Supreme Court of the United States stated:

> It is true that under the appeal statute the lower court had complete power to reverse any ruling of the territorial court on law or fact; but we are of the opinion that this power should be exercised only in cases of manifest error. (305 U.S. 109).

This principle has been reaffirmed repeatedly in this court.

Lord v. Territory of Hawaii, 79 F. (2d) 761 (C.A. 9, 1935);

Walker v. O'Brien, 115 F. (2d) 956 (C.A. 9, 1940);

Pioneer Mill Co. v. Victoria Ward, 158 F. (2d) 122 (C.A. 9, 1946);

De Mello v. Fong, 164 F. (2d) 232 (1947);

Meyer v. Territory of Hawaii, 164 F. (2d) 845 (C.A. 9, 1947);

Carey v. Hilo Finance & Thrift Co., 170 F. (2d) 236 (C.A. 9, 1948).

It was restated by the Supreme Court of the United States with reference to Puerto Rico in—

Bonet v. Texas Co., 308 U.S. 463 (1940); and

De Castro v. Board of Comm'rs., 322 U.S. 451 (1944);

in both of which the Supreme Court equated manifest error to inescapable error.

In *Carey v. Hilo Finance & Thrift Company, supra,* where the Hawaiian courts had been called upon to determine as a matter of fact from the evidence what the agreement between the litigants had been upon

which the suit was brought, this Court affirmed, saying:

> We think the conclusion reached by the Supreme Court of Hawaii could be reasonably drawn from the evidence.
> 170 F. (2d) 236, 237.

In similar situations the Court of Appeals of the First Circuit dealing with appeals from the Supreme Court of Puerto Rico had stated the rule to be that such findings of fact when supported by evidence will be adopted, *Reyes v. La Capital De Puerto Rico,* 106 F. (2d) 199 (C.A. 1, 1939); or that where there is conflicting evidence on disputed questions of fact, the trial judge having seen the witnesses and been in a better position to judge their credibility, and the findings of the two lower courts being in accord, those findings will be adopted, *Morales v. Velez,* 18 F. (2d) 519 (C.A. 1, 1927).

Appellant significantly has omitted all reference to this chain of decisions in his brief or to the principles announced therein. The force and effect of these principles cannot be avoided, however, and their application denies a reversal in this case.

B. The evidence supports the findings of fact of the courts below.

In the statement of facts in this brief, *supra,* detailed reference is made to the evidence as it appears in the record. We will not repeat that statement here.

The crucial findings of the courts below were:

(1) That the contribution of $3,000 by appellant was a condition precedent to his becoming a partner with appellees in the ownership of the Green Mill Cafe (R. 66).

Evidence supporting this can be found in Petitioner's Exhibit A (R. 130) and in the testimony of Dr. Tong (R. 112) and of appellant himself (R. 285, 287). There is apparently no disagreement as to this fact.

(2) That appellant did not contribute his $3,000.

This is undisputed (R. 66).

(3) That this failure arose not from fraud or unfair dealing on the part of appellees but through appellant's own fault (R. 66-68).

In this connection the court found that the time for performance originally set by the parties was October 1, 1941 (R. 64), (this had been alleged in the petition, par. V, R. 6) but that the purchase was not consummated until the 20th of October retroactive to the 1st (R. 65). This is supported by Petitioner's Exhibit C (R. 161).

The court found that as a party to the oral agreement with the seller (which he admittedly was) he knew of the original time of performance, but that appellees acquiesced in giving him until the agreement was consummated to perform and gave him notice of this extension. This is supported by Petitioner's Exhibit A (R. 130) of October 6, 1941, in

which he was told he had three shares—"that is if you get the dong (money) by then"; by the testimony of Chong Hing Tenn that he demanded the money from him (R. 168, 244); by the evidence of Dr. Tong that as late as the phone call from Attorney Fong's office he told appellant he was in if he got the money (R. 145, 345); and by the evidence that the appellant was well informed as to the progress of the transfer since he was present when the inventory of the stock was taken (R. 270) and was dropping into Attorney Fong's office to check on the progress being made with the legal papers (R. 328, 331, 332, 339, 340). Attorney Fong testified:

> Q. In fact, it was your understanding at the time that Mr. Ching was one of the principal cogs in the wheel?
>
> A. Well, he came to my place three or four times and talked about it. I think he also talked about an inventory, and things like that.
>
> Q. All the details that went with the purchase of the business?
>
> A. He seemed to know what was going on.

In the light of this evidence the court rejected appellant's explanation that he did not contribute because no demand was made upon him for the money, and ruled as a matter of law that having failed to meet the condition precedent of contribution appellant could not recover. Clearly the evidence supports the findings of the court.

C. The legal conclusions of the court were correct.

The question of what the terms of a contract are when there is a dispute in the evidence is of course one of fact.

Carey v. Hilo Finance & Thrift Co., supra;

Murphy v. Nelson, 306 Mass. 49, 27 N.E. (2d) 678 (1940);

McCormack v. Jermyn, 351 Pa. 161, 40 A. (2d) 477 (1945);

Copp v. Van Hise, 119 F. (2d) 691 (C.A. 9, 1941);

Rizzo v. Cunningham, 303 Mass. 16, 20 N.E. (2d) 471 (1939).

As we have pointed out, the Hawaiian Supreme Court held that the appellant's participation as an owner and partner in the Green Mill was by agreement conditioned on his putting up his agreed $3,000 contribution and that he failed to do so through his own fault and not that of appellees. Accordingly the court concluded that appellant could not recover as a partner.

It is black letter law that a party cannot claim as a partner until he has performed the conditions precedent in the agreement of partnership.

68 *C.J.S.* Partnership, Section 11.

Numerous cases from differing jurisdictions have applied this principle and denied petitioners recovery in situations similar to this.

Bird v. Hamilton, Walker's Chancery (Mich. 1844) 361;

Westwood v. Cole, 120 N.Y.S. 884 (1910);
Costello v. Gleeson, 19 Ariz. 532, 172 P. 730 (1918);
Lipscomb v. Ballard, 106 W. Va. 694, 146 S.E. 826 (1929);
Chancellor v. Brachman (Tex. Civ. App.), 41 S.W. (2d) 1014 (1934);
Cohen v. Standard Acc. Ins. Co., 203 S.C. 263, 17 S.E. (2d) 230 (1941).

In each of these cases there was a failure on the part of a party to contribute his agreed share of the capital, and in each, despite the fact that services had been rendered or the business begun by the other partners pending that partner's contribution, it was held that the agreement to form a partnership remained executory until the contribution was made and that the party failing to contribute was not a partner and could not recover as such.

Therefore, instead of there being manifest or inescapable error in its ruling, it would appear that the ruling of the Supreme Court of Hawaii was not only supportable but clearly correct.

D. The appellant's arguments do not establish manifest error.

Appellant in his brief (pp. 15-32) argues first that there was a fiduciary relationship between appellant and appellees by reason of their agreement to become partners, and that appellees, particularly Chong Hing Tenn, fraudulently concealed from him the progress of the transfer of the Green Mill Cafe, thereby depriving him of his interest in the enterprise, and

that as a result they hold in constructive trust for him.

The answer to this is that the two courts below found against appellant on the question of whether there was a fraudulent concealment of the facts from him (R. 64, 67). Not only is there evidence of repeated demands on appellant to contribute his $3,000 (Pet. Ex. A, R. 130, 145, 168, 244, 345) but there is also evidence that the appellant had full knowledge of the progress of the transfer (R. 270, 328, 332, 339, 340). This contention is therefore governed by the principles as to "manifest error" previously set forth.

Appellant's second argument (pp. 33-56) is that the partnership between himself and appellee was actually formed and not merely executory.

However, as has been pointed out in Section I B, the Supreme Court of Hawaii held that the agreement was one to form a partnership with appellant when he contributed his share; that he failed to do so through his own fault and not that of appellees. Evidence to support these findings was there cited. In I C we cited authorities in support of the proposition that in situations like the present the agreement is held to be executory until the contribution is made.

Moreover, in ascertaining intent, the parties' own construction of a contract is given great weight, whereas in our case here the terms of the agreement are disputed.

Moynahan Const. Co. v. Mohler, 225 Ind. 379, 75 N.E. (2d) 540 (1947);

Fowler v. Loughlin, 183 Md. 48, 36 A. (2d) 671 (1944);

Newman v. Jackson, 192 Okla. 461, 138 P. (2d) 76 (1943);

Murphy v. Nelson, supra.

Appellant himself construed the agreement as being executory when he failed to resign from the police force despite a department rule that anyone having an interest in a liquor department must do so (R. 195, 281, 313). As he stated:

> If I had purchased an establishment I would have resigned (R. 281).

Appellant argues, however, that the condition precedent was waived by launching the business (pp. 35-41). Undoubtedly a condition precedent can be waived but waiver is a matter of intent which in so far as it was raised was held against appellant below. The fact that one or more parties contribute their shares and commence business while awaiting the contribution of another does not waive that contribution as a condition precedent.

> A clear statement is found in the fourth point of the syllabus of the case of Bird v. Hamilton (1844) Walk. Ch. (Mich.) 361: "Where a party had failed to perform the preliminary conditions, upon the compliance with which a partnership was to be formed, and the other party to the agreement, to enable him to perform, furnished his own capital, and for a short time carried on business in the name of the proposed firm, it was held, that this was no waiver, and could not

entitle the defaulting party to the rights of a partner."

Lipscomb v. Ballard, supra, 146 S.E. 826, 829;
Bird v. Hamilton, supra;
Westwood v. Cole, supra.

Nor is the argument (pp. 41-44) that appellant was an equitable owner in the premises by reason of the oral agreement to purchase to which he was a party any more support for his position.

In the first place, as the Supreme Court of Hawaii pointed out (R. 78), this is a suit between the joint vendees concerning their rights upon an agreement *inter sese* and not a suit against or by the vendors, so that whether appellant was an equitable owner as regards the sellers has nothing to do with his rights against the appellees which are founded upon his agreement with them, which was an entirely separate agreement (R. 111, 285).

Moreover, the oral agreement to purchase the cafe involving as it did a lease of land (Petitioner's Ex. G, R. 227) and a liquor inventory of over $10,000 (R. 260) would give rise to no equitable ownership since it would be unenforceable under the statute of frauds (R.L.H. 1945, Secs. 8721, 9204).

Appellant argues that he acquired an ownership interest in the business by the rendition of services (pp. 44-46). The services he rendered were, however, clearly attributable to his job as manager (Pet. Ex. A, R. 130; Pet. Ex. E, R. 210, 237, 290). An agree-

ment to employ a person as a manager does not make him a joint adventurer, *Simpson v. Richmond Worsted Spinning Co.,* 128 Me. 22, 145 Atl. 250 (1929). Nothing indicates that the services allegedly rendered were to be a part of appellant's capital contribution. Again the question of whether there was a partnership depends on the agreement between the parties and the mere fact that services have been rendered does not make a man a partner.

In *Lipscomb v. Ballard, supra,* the court said:

> Nor are we concerned here with the fact that the plaintiff contributed valuable services in the construction work at Williamson and that some of his machinery and equipment was used therein. To enforce recovery for the value of his services and the use of his property his remedy at law is plain. 146 S.E. at 829.

Accord:

Cohen v. Standard Acc. Ins. Co., supra;
Chancellor v. Brachman, supra;
Coens v. Marousis, 275 Pa. 478, 119 A. 549 (1923).

This argument is therefore also without merit.

Appellant argues (pp. 46-49) that the letter of Dr. Tong (Pet. Ex. A, R. 130) admits an existing partnership. Obviously it does not. Appellant says the elements of partnership existed (pp. 49-50). As pointed out before, the agreement was executory and appellant's default prevented his becoming a partner.

Appellant argues that the Hawaiian case of *Lathrop v. Wood,* 1 Haw. 121 (1852) conflicts with the holding below in this case. It is, however, obvious that the cases are distinguishable, since in the *Lathrop* case on the evidence the Supreme Court of Hawaii concluded there was an existing partnership; while in this case it decided that the agreement was executory and subject to a condition precedent. Even if there was a conflict between the principles of law announced in the cases, however, it would not constitute the basis for reversal.

> That the construction is inconsistent with that which the same court placed on this statute in an earlier case proves nothing, except that the earlier decision was wrong and is now overruled.
>
> *Lord v. Territory of Hawaii,* 79 F. (2d) 761, 764 (C.A. 9, 1935).

Appellant contends (pp. 56-60) that the oral decision made at the close of trial (R. 393-399) is still extant and binds the Supreme Court. As the Supreme Court recognized when this point was for the first time raised in the petition for rehearing the written decision is at variance with the oral decision (R. 79). After the trial judge had ruled for appellant (R. 393-399) he set his order aside and took the case under advisement (R. 43) and later issued a diametrically opposed written opinion (R. 43). Obviously, the trial judge's self-reversal was occasioned by a change of mind on reflection as to the credibility and weight of the evidence.

Appellant's argument on this point is the most puerile sort of quibbling and is obviously the result of the shift of counsel after the Supreme Court of Hawaii's decision (R. 69, 70).

Appellant argues (pp. 60-73) that the Supreme Court of Hawaii erred in holding that a tender by appellant was necessary. His argument is that the evidence shows that appellant was ready and willing to contribute, that the appellees made no demand, and that their conduct made tender useless. These are all questions of fact found against appellant in two courts below and the findings below are amply supported by the evidence. Section I B and Statement of Facts, *supra*. Appellant urges that the holdings of the courts below are based solely on Petitioner's Exhibit A, R. 130, which, being a document, this court is free to construe without regard to the construction below. Such a contention obviously conflicts with the manifest error rule. Moreover, the holding below was based on and is supported by ample evidence of demand (R. 145, 168, 244, 345) and other matters in addition to that exhibit (Pet. Ex. A, R. 130). He urges that the testimony of K. C. Wong that he would have lent $2,000 unsecured to appellant is unimpeached and shows appellant's ability to have tendered. But there is ample other evidence in the record that appellant was in bad financial straits (R. 194, 317), that demand was made (Pet. Ex. A, R. 130, 145, 244, 345) and that he did not consider himself a purchaser (R. 281), all of which, together

with the undisputed fact that he did not tender, throws strong doubt on his contention of ability to pay.

Appellant in Part V of his brief (pp. 73, 78) challenges several of the findings of the Supreme Court of Hawaii.

The finding criticized in Part A is of course clearly correct. The agreement was rescinded by neither appellant nor appellees, and remained in effect until appellant's failure to meet the condition precedent of contribution terminated it. Even if the finding were wrong, however, it is difficult to see how such an error would aid appellant.

The finding criticized in Part B is a repetition of paragraph V of appellant's sworn petition. Moreover, this is ample evidence that appellees took over the business on October 1 (R. 167, 168, 241), that the deal could not be consummated until the purchase price was paid (R. 118, 138, 246) and that a down payment was made and the rest paid as soon as the liquor license was transferred (R. 253). Moreover the record shows that appellees paid $15,000 September 30 (Res. Ex. 3, R. 376) and the remaining $10,000 October 2 (Res. Ex. 4, R. 377) and also contains evidence of demands by appellees on appellant to put up his share (Pet. Ex. A, R. 130, 145, 168, 244, 345). Thus the finding is supported by evidence. Moreover, the October 1st date is not important to the Supreme Court's holding since it found that the time was extended till October 20.

The findings criticized in Parts C, D, E and F have all been shown heretofore in this brief to be supported by evidence.

Appellant's sixth contention (p. 78) was that it was incumbent on the Supreme Court of Hawaii to find whether the agreement was one for a partnership or a joint venture. Since in both cases petitioner would have to comply with the conditions precedent (Compare *Lipscomb v. Ballard, supra,* (partnership) with *Commercial Bank v. Welden,* 148 Cal. 601, 84 Pac. 171 (1906) (joint venture)), this argument is meritless.

Since the findings and conclusions of the Supreme Court of Hawaii are supported by the evidence and the authorities, reversible error was not committed in the decision complained of.

II.

APPELLANT WAS GUILTY OF LACHES.

A. The decision below.

A secondary ground of decision in the trial court's opinion (R. 47-48) was that appellant could not recover because of laches. The trial court stated "Equity helps the vigilant, not those who sleep on their rights." Laches was expressly pleaded in the answer (R. 19).

The Supreme Court of Hawaii did not reach this secondary ground since it affirmed on the primary

ground of appellant's nonperformance. This court could, however, pass upon this question if necessary, since, even in those cases in which (unlike the present) a lower court has the wrong reasons, it will be affirmed if it reaches the correct result.

It is clear that under the facts and on the law the trial court correctly held appellant guilty of laches.

B. The Situation.

Laches, like other equitable doctrines, is not hedged about with hard and fast requirements. It is an equitable defense sustained whenever a petitioner, knowing his rights, has delayed taking action to enforce them and, because of that delay, the respondent is so prejudiced as to make it unfair to grant petitioner's prayer.

In the case at bar, appellant was warned to put up his $3,000 (Pet. Ex. A; R. 130, 145, 168, 244, 345). He failed to do so and was excluded from the partnership (R. 146). He knew in October 1941 that he had been excluded (Tr. pp. 299, 372), yet he made no tender then, or ever, of the share which he was to have contributed (R. 316). He knew that the appellees did not agree with his claim that he was entitled to part of the business (R. 301) but he took no action. The war came; the Green Mill was closed, and appellees had a white elephant on their hands (R. 138, 313). Still no tender from appellant. Eventually the Green Mill reopened; soon it was coining money; still appellant delayed. The war moved further into the Pacific; Hawaii became absolutely safe,

and eventually, after two and one-half years, in April 1944, appellant filed his bill (R. 309).

Despite appellant's attempt to assert that there has been no prejudice to the appellees by his delay, the fact remains that they put up all the money (Res. Ex. 2, R. 372), sustained the losses while the business was closed after the blitz (R. 138), and ran the business for two and one-half years. They weathered out the drop in value of the property after the blitz and during the time the Green Mill was closed, while appellant hung back until the business had become a gold mine, before he finally stepped forward to try to enforce his claim.

Appellant alleged in his fourth amended bill that appellees continued negotiations with him until 1943; that Dr. Tong had promised him, in January, 1943, to compensate him in respect to this claim; and that he had been lulled into a sense of security thereby (R. 15). On trial there was a complete failure of proof to support these allegations (R. 310).

C. Whether or not appellant has been guilty of laches depends upon the circumstances of the case.

The question of laches depends upon the circumstances of the case. This rule has been set down repeatedly in the Hawaiian cases.

> The question of laches does not depend upon the fact that a certain definite time has elapsed, but whether under all the circumstances petitioner is chargeable with a want of diligence.
>
> *Hurst v. Kukahi,* 25 Haw. 194, 196 (1919).

The cases in which the defense of laches has been involved and considered are very numerous. There is no artificial, fixed or determinate rule according to which the defense is applied. By reason of the differences in the facts, no one case becomes an exact precedent for another. So each case as it arises must be decided according to its own peculiar circumstances, taking into consideration all the elements which affect the question. . . . The matter is in the judicial discretion of the court.

In re Nelson, 26 Haw. 809, 817 (1923).

D. Laches does not require the passage of any fixed length of time.

The length of time which must elapse in order to show laches varies with the peculiar circumstances of each case and is not subject to any arbitrary rule.

Lucas v. American-Hawaiian Engineering Co., 16 Haw. 80, 87 (1904);

Magoon v. Lord-Young Engineering Co., 22 Haw. 327 (1914).

The question of laches does not depend as does the statute of limitations, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did.

Houghtailing v. De La Nux, 25 Haw. 438, 443 (1920);

Hurst v. Kukahi, supra.

E. Thus, in particular circumstances, relatively short delays have been held to constitute laches.

Indeed, in some cases the diligence required is measured by months rather than years. Pollard v. Clayton, 1 Kay & Johnson 462; Atwood v. Small, 6 Clark & Finelly 232. And in others a delay of two, three and four years has been held fatal. Twin-Lick Oil Co. v. Marbury, 91 U.S. 587; Haywood v. Nat'l. Bank, 96 U.S. 611; Holgate v. Eaton, 116 U.S. 33; Hageman v. Bates, 5 Colorado App. 391; Graff v. Portland Co., 12 Colorado App. 106.

Patterson v. Hewitt, 195 U.S. 309, 319 (1904).

A few of the more recent cases in which a delay of about the same length as that in the case at bar has been held to constitute laches are:

Neet v. Holmes, 25 Cal. (2d) 447, 154 P. (2d) 854 (1944); —10 months

De Lamar Mines of Montana v. Mackay, 104 F. (2d) 271 (C.A. 9, 1939); —19 months

Warfield v. Anglo & London Paris National Bank, 202 Cal. 345, 260 P. 881 (1927); —36 months

Dry v. Rice, 147 Va. 331, 137 S.E. 473 (1927) —26 months.

F. The general rule is that the trial court has discretion as to whether to apply the doctrine of laches in a particular case.

Whether a plaintiff has been guilty of laches in a particular case is a question largely within the discretion of the trial court.

Lucas v. American-Hawaiian Engineering Co., supra.

The matter is within the judicial discretion of the court.

In re Nelson, supra, at p. 817.

G. The circumstances of this case demand an application of the doctrine.

Whenever the delay is mere neglect to seek a known remedy or to assert a known right, which defendant has denied, and is without a reasonable excuse, the courts are strongly inclined to treat it as fatal to the plaintiff's remedy in equity, even though much less than the statutory period of limitations, if an injury would otherwise be done to the defendant by reason of the plaintiff's delay.

Teachey v. Gurley, 214 N.C. 288, 199 S.E. 83, 88 (1938).

A person may not withhold his claim awaiting the financial outcome of a doubtful enterprise, and after financial success has resulted assert his interest, especially where he has thus avoided the risks of the enterprise.

Young v. Bradley, 142 F. (2d) 658, 662 (C.A. 6, 1944), Cert. den. 323 U.S. 775.

Accord:

Alexander v. Phillips Petroleum Co., 130 F. (2d) 593 (C.A. 10, 1942);

Wade v. Pettibone, 11 Ohio 57, 37 Am. Dec. 408 (1841).

The decision in *Young v. Bradley, supra,* is quite typical of the way courts have handled cases like the present one, in which the party bringing the action has let someone else risk his money, and then, when success was assured, stepped forward in the courts to claim a share.

In that case the petitioners had secured positions for the respondents as corporation officials. The respondents had bought stock and securities in another corporation for themselves. Four years later, when the securities had finally become of great value, the petitioners brought an action claiming that there had been a mutual understanding that the respondents would purchase the securities for the petitioners. And that therefore respondents held on trust. The court held that no trust had been shown and then went on to say that even if the petitioner's claims had more substantive merit they would be barred because the delay in these circumstances amounted to laches.

As in the *Young* case, we have here the elements of risk of capital on the part of the appellees and delay on the part of appellant; here, as there, appellant waited to seek his remedy until all danger to the enterprise was past. The trial court in the exer-

cise of its discretion was well justified in holding that it would be inequitable to permit appellant to recover.

CONCLUSION.

For the reasons stated, the judgment below should be affirmed.

Dated, Honolulu, Hawaii,
May 25, 1951.

Respectfully submitted,
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